Nos. 87-1589 and 87-1888

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

THE PITTSBURGH & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION and
(in No. 87-1888) INTERSTATE COMMERCE COMMISSION,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF FOR THE NATIONAL RAILWAY LABOR CONFERENCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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January 18, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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This *amicus* brief is being filed with the written consent of the parties pursuant to Supreme Court Rule 36.2.

STATEMENT OF THE CASE

Under § 10901 of the Interstate Commerce Act ("ICA"),[1] a noncarrier can acquire a rail line from an existing railroad only if the Interstate Commerce Commission ("ICC" or "Commission") approves "with conditions the Commission finds necessary in the public interest"—which may include employee protections. In its *Ex Parte 392* proceeding, the ICC established an expedited class exemp-

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[1] The ICA was codified in 1978 as Subtitle IV of 49 U.S.C., 92 Stat. 1337. Citation herein to a current section of the Act is to that section of 49 U.S.C.

tion procedure authorizing a proposed § 10901 acquisition to be consummated seven days after notice is filed with the Commission.[2] Rejecting arguments by Respondent Railway Labor Executives' Association ("RLEA"), the ICC concluded that "[e]mployee protection is also inconsistent with our goals in granting this class exemption and would discourage acquisitions and operations that should be encouraged. The record supports a conclusion that the acquirer would not be able to complete the transaction if those conditions were imposed" (1 I.C.C.2d at 814); and—unlike the abandonment alternative—"in transactions under section 10901, operations are continuing and jobs for rail employees will continue to be available" (*id.* at 815).[3]

The ICC authorized a noncarrier to acquire all the rail lines of Petitioner ("P&LE"), effective September 26, 1987, after denying RLEA's petition for a stay since "it is in the public interest to allow the class exemption

[2] *Class Exemption for the Acquisition and Operation of Rail Lines under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1985), aff'd *sub nom.* without opinion, *Illinois Commerce Com'n* v. *I.C.C.*, 817 F.2d 145 (D.C. Cir. 1987). The judgment on that appeal (to which the RLEA was a party), App. A to NRLC's *amicus* brief in support of the petition in No. 87-1589, reveals that the affirmance was "for the reasons set forth in the decision of the Commission." In a subsequent *Ex Parte 392* proceeding, the ICC increased the notice period for larger transactions (requiring 14-days pre-filing notice and authorizing consummation 21 days after filing). See 53 Fed. Reg. 5981. In an accompanying unpublished opinion (served February 29, 1988), the ICC observed (p. 2) that "the exemption process has been successful beyond expectation" in facilitating establishment of "new carriers [that] preserve service, jobs, and rail investment" and that "typically provide better service, more tailored to individual shippers' needs;" and that the "ability to begin operations promptly is a key to the exemption's success."

[3] The ICC reserved jurisdiction to "revoke the exemption, in whole or in part, and impose labor protection" upon "an extraordinary showing of circumstances justifying" such protection in an individual case. 1 I.C.C.2d at 815.

to take effect" (Pet. in No. 87-1888 at 103a). In the meantime, unions representing P&LE employees served notices of proposals for a collective agreement under which in the event of sale P&LE would be required to provide employees lifetime wage guarantees, and treble damages (in addition to make-whole damages) for any losses incurred, and to include in any contract of sale provisions requiring the purchaser to assume P&LE's employees, collective agreements and unions; RLEA filed this action on behalf of those unions to enjoin consummation of the sale until the major-dispute provisions of the Railway Labor Act ("RLA") have been exhausted in regard to the employee protections to be provided; and on September 15, 1987, the unions struck the P&LE.

The District Court preliminarily enjoined that strike, holding that the ICA superseded any duty to bargain under the RLA and that § 4 of the Norris-LaGuardia Act ("NLGA") must be accommodated to the jurisdiction of the ICC. App. B to Pet. in No. 87-1589. The Third Circuit summarily reversed in an opinion limited to the NLGA issue (*id.*, App. A), *Railway Labor Exec.* v. *Pittsburgh & Lake Erie R.*, 831 F.2d 1231 (1987) ("*P&LE I*"), now before this Court in No. 87-1589. Although the Third Circuit acknowledged that the NLGA should be accommodated to other statutes "adopted as a part of a pattern of labor legislation," in its view § 10901 of the ICA is not such a statute because labor protection is only one of "fifteen policies relevant to the regulation of the railroad industry" and thus is merely "incidental" to the "regulatory scheme over rail transport . . . ." Pet. at A-6 and 7-8; 831 F.2d at 1234, 1235.

Upon remand, the District Court ordered P&LE to bargain with the unions and enjoined consummation of the sale until the major-dispute procedures of the RLA are exhausted, unless the sale agreement "include[s] provisions for the maintenance of the status quo" by the purchaser. Pet. in No. 87-1888 at 85a. The Third Circuit

affirmed in *Ry. Labor Executives* v. *Pittsburgh & Lake Erie R.*, 845 F.2d 420 (1988) (*"P&LE II"*), now before this Court in No. 87-1888. Among other things, it held that P&LE has a duty under the RLA to bargain about the effects of the sale upon employees and thus to defer consummation of the sale pending such bargaining unless that duty has been superseded by the ICA (Pet. at 18a-26a; 845 F.2d at 428-432); that the injunction does not constitute a collateral attack upon the ICC's authorization of the sale (Pet. at 36a-43a; 845 F.2d at 437-440); and that the ICA does not supersede P&LE's duty to bargain under the RLA (Pet. at 44a-56a; 845 F.2d at 440-446) because, among other things, as held in *P&LE I*, § 10901 is not a labor law and only one of "fifteen distinct policies upon which the ICC must focus . . . directs the ICC's attention to the interests of labor"; so that "the interests of labor are, at best, only a relatively small concern of the ICC," making "it highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection" (Pet. at 47a-48a; 845 F.2d at 442). In reaching those conclusions, the court acknowledged that "imposing the RLA requirements in this situation may well have the practical effect of torpedoing the sale" (Pet. at 20a; 845 F.2d at 429). That has since occurred.

INTEREST OF AMICUS CURIAE

The National Railway Labor Conference ("NRLC") is an unincorporated association of almost all of the nation's class I railroads. It represents members in multi-employer collective bargaining under the RLA and in regard to other labor relations matters of concern to the railroad industry generally. The NRLC on occasion has been confronted with union proposals for a national agreement upon protections for employees affected by a transaction approved by the ICC and such proposals are included in pending notices served by the unions under § 6 of the RLA. The NRLC has maintained that such

issues should be determined by the ICC and are not mandatorily bargainable under the RLA.

As is most fully set forth in *FRVR Corporation, Etc.*, F.D. No. 31205 (served January 29, 1988), *aff'd* as clarified on other grounds, 861 F.2d 1082 (8th Cir. 1988), *Ex Parte 392* was a deliberate, thoroughly considered, policy decision to facilitate the establishment of short-line and regional railroads, through line sales to non-carriers, as a viable alternative to abandonments. See App. B to the NRLC's *amicus* brief in support of the petition in *P&LE I*, and the discussion thereof at pp. 6-9 of that brief. Until virtually brought to a halt by the decisions below in this case, that "policy had been validated by practical results. New railroad formation quickened, abandonments fell, service was maintained and typically improved, and rail jobs that might otherwise have been lost were preserved." App. B at 6a.

If a railroad is required to exhaust the major-dispute procedures of the RLA before consummating a line sale, the delay in itself may torpedo the sale (as occurred in regard to the P&LE), since it must be rare that a potential purchaser can obtain assurances of financing or otherwise is willing and able to wait out prolonged delays.[4] Those procedures include conferences, mediation

[4] Although not at issue in this case, a carrier may have at least an arguable basis for contending that the effects of line sales upon employees are governed by general provisions in existing agreements, such as those regarding furloughs, or by established practices, so as to give rise to a minor dispute for an adjustment board to decide. *E.g., Chicago and North Western Transp. Co.* v. *RLEA*, 855 F.2d 1277 (7th Cir. 1988), *cert. denied*, 57 U.S.L.W. 3374 (1988). If so, the sale normally may be consummated without awaiting the decision of the adjustment board. *Ibid.* The court below noted that the parties had not argued that P&LE's collective agreements either permit or prohibit the proposed sale, so as to require an interpretation of those agreements and thus give rise to a minor dispute in this case. Pet. in *P&LE II* at 16a-17a n.9; 845 F.2d at 428 n.9. In any event, an adverse arbitration ruling could give rise to claims for damages, even if the sale is not required to be

and, at the discretion of the President, investigation and recommendations by an emergency board. See *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 378 (1969). With good reason, they have been characterized by this Court as "long and drawn out," *Railway Clerks* v. *Florida E.C.R. Co.*, 384 U.S. 238, 246 (1966), as "almost interminable," *Shore Line* v. *Transportation Union*, 396 U.S. 142, 149 (1969), and as "virtually endless," *Burlington Northern Railroad Co.* v. *Brotherhood of Maintenance of Way Employes*, 55 U.S.L.W. 4576, 4580 (1987). In NRLC's experience, exhaustion of those procedures often requires two years or more. After that, as those cases also demonstrate, the union may strike the railroad primarily involved in the dispute and secondarily picket all other railroads.

As the ICC found, the decision in *P&LE I* is "threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interests of carriers, labor, and the shipping public." *FRVR Corporation, Etc.*, App. B *supra* at 12a. Even if that decision is reversed, the *P&LE II* decision would similarly obstruct effectuation of the ICC's policy unless also reversed. Both decisions decide important questions of law and both should be reversed.

SUMMARY OF ARGUMENT

This case invokes "the classic judicial task of reconciling" potentially conflicting provisions in three statutes "and getting them to 'make sense' in combination . . . ." *United States* v. *Fausto*, 56 U.S.L.W. 4128, 4132 (1988). This can best be done by holding that any duty to bargain under the RLA and the prohibition of strike injunc-

undone. And, neither a minor-dispute ruling nor an arbitration decision upholding the carrier would in itself prevent the unions from progressing their § 6 notices through the major-dispute procedures of the RLA and from striking once those procedures are exhausted in the absence of an agreement upon the unions' demands.

tions in the NLGA must be accommodated to, and thus have been superseded by, the exclusive jurisdiction of the ICC over line sales and to condition authorized sales upon employee protections when in the public interest. This is particularly so since the RLEA could (and did) present its views to the ICC.

This Court has accommodated the NLGA to other statutes enacted as part of a pattern of labor legislation, particularly when those statutes have established administrative techniques for the peaceful resolution of labor disputes such as is done by § 10901 of the ICA. The erroneous conclusion below in *P&LE I* that § 10901 is not a labor statute because labor protection is only one of 15 policies specified in the national railroad transportation policy to guide the ICC, led to the erroneous conclusion in *P&LE II* that the ICA does not supersede any duty under the RLA to bargain about employee protections since "the interests of labor are, at best, only a relatively small concern of the ICC."

The jurisdiction of the ICC over labor protections in regard to line sales is not an aberration, as similar jurisdiction is conferred in regard to abandonments, mergers and various other railroad transactions requiring ICC authorization. This Court recognized that the predecessors of those provisions of the ICA as well as the predecessor of the RLA were part of the "extensive history of legislation regulating the relations of railroad employees and employers." *United States* v. *Lowden*, 308 U.S. 225, 235 (1939). And, the Court held there and elsewhere that the employee-protection jurisdiction of the ICC serves the public interest by, among other things, preventing disputes in that regard from interrupting rail transportation. Moreover, there is no basis for the asserted "small concern" with the interests of labor other than the fact that the ICC also considers other interests and policies. That weighing of conflicting interests and policies is a traditional function of admin-

istrative agencies. The fact that Congress has entrusted the ICC with that function as to line sales affords a strong reason for accommodating the RLA and the NLGA to the jurisdiction of the ICC rather than for concluding —as did the court below—that this made "it highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection."

In the alternative, the Court also could hold that employee protections in connection with line sales are not included in the "rates of pay, rules, or working conditions" as to which the RLA mandates bargaining. In giving the ICC jurisdiction to condition such authorizations upon employee protections when in the public interest, Congress must have concluded that they are not amenable to "the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole"—upon which "the concept of mandatory bargaining is premised." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 678 (1981). Thus, the term "working conditions" in the RLA is narrower on its face than the "terms and conditions of employment" made mandatorily bargainable by the National Labor Relations Act ("NLRA"), and is less susceptible to an interpretation that extends beyond the physical conditions under which employees work to the terms and conditions under which employee status is conferred or withdrawn.

Hence, the conclusions by this Court that the NLRA does not restrict an employer's right to go completely out of business or mandate bargaining over a partial-closure decision have substantially stronger support under the RLA: while the view of the National Labor Relations Board ("NLRB") that the NLRA nonetheless mandates bargaining over the effects of such actions upon employees clearly is untenable under the RLA. A holding that effects bargaining is mandatory could give rise to

"almost interminable" delay before the sale could be consummated, and thus in itself torpedo a sale authorized by the ICC as has occurred in regard to the P&LE. Although much less, the delay normally incurred under the NLRA was an important factor in this Court's conclusion in *First National Maintenance* that decision bargaining is not mandated, and that factor deserves much greater weight under the RLA.

ARGUMENT

This case involves the interaction of potentially conflicting provisions in three federal statutes. It thus preeminently calls for an exercise of the "classic judicial task of reconciling many laws enacted over time, and getting them to 'make sense' in combination . . . ." *United States* v. *Fausto*, *supra*, 56 U.S.L.W. at 4132. The court below failed that task, and indeed erroneously felt itself constrained from undertaking it.[5]

It does not make sense to hold that Congress, which entrusted the ICC with exclusive jurisdiction over railroad line sales and to condition approvals of such sales

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[5] Although "not happy" with the result in *P&LE II*, the court felt "constrained to reach it, because the Supreme Court has appropriately admonished the judiciary not to apply its own brand of 'common sense' in the face of a contrary statutory mandate" (Pet. at 57a; 845 F.2d at 446), citing *TVA* v. *Hill*, 437 U.S. 153, 193-195 (1978). But in *Hill* the losing party relied upon Appropriations Acts, and the "doctrine disfavoring repeals by implication . . . . applies with even *greater* force when the claimed repeal rests solely on an Appropriations Act." 437 U.S. at 190 (emphasis by the Court). Moreover, that doctrine is not applicable at all where the "repeal" pertains to a judicial interpretation of general statutory language rather than to an express statutory provision. *United States* v. *Fausto*, *supra*, 56 U.S.L.W. at 4132. Any duty to bargain under the RLA involves an interpretation of general statutory language. See pp. 20-29 *infra*. Yet, one reason asserted in *P&LE II* for holding that any such duty to bargain has not been superseded by the ICA was the doctrine that "repeals by implication are heavily disfavored." Pet. at 45a; 845 F.2d at 440.

upon employee protections when in the public interest, nonetheless authorized unions to frustrate consummation of approved sales by invoking the major-dispute procedures of the RLA, and barred the courts from enjoining strikes intended to prevent the sales. That is particularly so since the unions may present their views as to appropriate employee protections to the ICC and, on appeal therefrom, to the courts, as the RLEA did in *Ex Parte 392*. See *Missouri Pacific R. Co.* v. *United Transp. Union*, 782 F.2d 107, 111-112 (8th Cir. 1986), *cert. denied*, 55 U.S.L.W. 3837 (1987).

The most fundamental error below is the conclusion in *P&LE I* that § 10901 of the ICA is not a "labor statute" to which the NLGA need be accommodated. That error fatally infected the ruling in *P&LE II* that the ICA does not supersede any duty to bargain under the RLA in regard to line sales authorized by the ICC. We thus first demonstrate that the jurisdiction of the ICC over labor protections is an integral and important part of the statutory scheme under the ICA in regard to line sales and to various other railroad transactions as to which ICC approval is required—thereby permitting an administrative agency to weigh the interests of labor with other factors affecting the public interest and assuring that consummation of approved transactions cannot be prevented by labor. It then becomes obvious that the RLA and the NLGA should be accommodated to that statutory scheme, as a matter of law and of common sense. We then demonstrate that neither the decision to make a line sale nor its effects upon employees are mandatorily bargainable under the RLA.[6]

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[6] The court below also erred in rejecting the contention that the injunction in *P&LE II* constituted an improper collateral attack upon the ICC's order. We noted the fundamental errors in that ruling in our *amicus* brief in support of the petition in *P&LE II* at 13-15. Since the page limit on *amicus* briefs does not permit a fuller discussion now, we respectfully refer the Court thereto. See also n.12, pp. 18-19 *infra*.

I. The Railway Labor Act and the Norris-LaGuardia Act Should Be Accommodated to the Exclusive Jurisdiction of the Interstate Commerce Commission Over Line Sales.

The RLA governs collective bargaining in the railroad and airline industries. 45 U.S.C. §§ 151 *et seq.* Its "major purpose . . . was 'to provide a machinery to prevent strikes.'" *Texas & N.O. R. Co.* v. *Ry. Clerks*, 281 U.S. 548, 565 (1930). Among other things, it mandates bargaining in regard to proposals for a "change in agreements affecting rates of pay, rules, or working conditions" (45 U.S.C. §§ 152 First, 156). Although the RLA requires the parties to such a "major" dispute to maintain the *status quo* while the procedures of the Act are being exhausted, the unions thereafter may seek to coerce acceptance of their demands by self help including strikes. See pp. 5-6 *supra*.

Section 4 of the NLGA deprives the federal courts of jurisdiction to issue injunctive relief as to labor disputes regardless of the industry involved. 29 U.S.C. § 104. It was enacted "to remedy the growing tendency of federal courts to enjoin strikes by narrowly construing the Clayton Act's labor exemption from the Sherman Act's prohibition against conspiracies to restrain trade . . . ." *Jacksonville Bulk Terminals* v. *Longshoremen*, 457 U.S. 702, 708 (1982). Although this Court "has consistently given the anti-injunction provisions of the . . . Act a broad interpretation," the Court also has held those provisions to be inapplicable "where necessary to accommodate the Act to specific federal legislation or paramount congressional policy." *Ibid.*

The ICA regulates railroads, motor carriers, inland water carriers and freight forwarders. 49 U.S.C. §§ 10101 *et seq.* The ICC's jurisdiction thereunder is "exclusive and plenary," and that "is critical to the congressional scheme," as this Court stated in regard to the predecessor of § 10901. *Chicago & N.W. Tr. Co.* v. *Kalo Brick*

& Tile Co., 450 U.S. 311, 321 (1981). That jurisdiction does not extend to the labor-management relations of the regulated carriers generally, but does include one limited aspect of railroad labor-management relations. The ICC has jurisdiction to impose labor protections deemed to be in the public interest in line sales under § 10901, and in certain other railroad transactions such as abandonments under § 10903 and mergers, consolidations and other acquisitions involving two or more existing railroads under §§ 11343-11347 of the ICA. Hence, the Court appropriately could apply the doctrine that, where "there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment," in reversing the decisions below. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976); *Morton* v. *Mancouri*, 417 U.S. 535, 550-551 (1974).

But however that may be, this Court has recognized "the need to accommodate two statutes when both were adopted as a part of a pattern of labor legislation." *Trainmen* v. *Chicago R. & I.R. Co.*, 353 U.S. 30, 42 (1957). The Court there accommodated the NLGA to § 3 of the RLA (45 U.S.C. § 153), under which adjustment boards have exclusive jurisdiction to decide "minor" disputes over the interpretation or application of collective agreements, so as to permit strikes over such disputes to be enjoined. 353 U.S. at 39-42. This "accommodation" doctrine is a leading example of what the Court in *Fausto* referred to as the "classic judicial task" of reconciling separately enacted statutes relating to the same matter so that they "'make sense' in combination." See p. 9 *supra*. While "congressional emphasis" in regard to the rights of labor has shifted, "this shift in emphasis was accomplished . . . without extensive revision of many of the older enactments," so that in accommodating them "consideration must be given to the total corpus of pertinent law and the poli-

cies that inspired ostensibly inconsistent provisions." *Boys Markets* v. *Clerks Union*, 398 U.S. 235, 250-251 (1970).[7]

Among other things, the NLGA is accommodated so as not to prevent effectuation of statutes in which "congressional emphasis shifted from protection of the nascent labor movement . . . *to administrative techniques for the peaceful resolution of labor disputes.*" *Id.* at 251 (emphasis added). The ICA in § 10901 establishes administrative techniques for peacefully resolving disputes over labor protections in connection with authorized line sales. Yet, the court below in *P&LE I* concluded that § 10901 is not a "labor statute" to which the NLGA should be accommodated since labor protection is only one of "fifteen policies relevant to the regulation of the railroad industry" comprising the national rail transportation policy set forth in § 10101a of the ICA. See p. 3 *supra*.[8]

That ruling was instrumental to the further ruling in *P&LE II* that any duty to bargain in regard to line sales under the RLA has not been superseded by, and

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[7] *Boys Markets* accommodated the NLGA so as to permit the federal courts to enjoin strikes over arbitrable disputes between unions and employers subject to the NLRA.

[8] The Third Circuit also erred in relying upon *Telegraphers* v. *Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), as having rejected arguments "comparable to those made by P&LE . . . ." Pet. at A-9; 831 F.2d at 1236. Some of the station closings involved in that case were approved by state regulatory agencies, but that was done pursuant to state law rather than to the ICA as the Third Circuit erroneously stated. See 362 U.S. at 332-333, 347-348, 353 n.18. *Telegraphers* did reject an "argument that the operation of unnecessary stations . . . runs counter to the congressional policy . . . to foster an efficient national railroad system," 362 U.S. at 342, but that argument had no basis in a specific statutory provision, such as § 10901, under which the ICC has jurisdiction to condition its approval of a transaction upon employee protections when in the public interest.

thus need not be accommodated to, § 10901 of the ICA. Citing its *P&LE I* ruling that § 10901 is not a labor law, and referring to the "fifteen distinct policies upon which the ICC must focus," of which "only one directs the ICC's attention to the interests of labor," the court below concluded that "the interests of labor are, at best, only a relatively small concern of the ICC," and thus thought "it highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection." See p. 4 *supra*.[9]

The purpose of the accommodation doctrine is the reconciliation of statutes dealing in diverse ways with the same subject matter so that they carry out the congressional intent in a way that makes sense, regardless of the label that might be attached to a particular statute. Moreover, the ICA is a "labor statute" in any normal sense of that term to the extent that it is concerned with labor protection, whatever else it also may be. The Transportation Act of 1920 (41 Stat. 456) amended the ICA to enact the predecessor of the current § 10901 in regard to line sales and § 10903 in regard to abandonments (§§ 1(18) and (20), 41 Stat. 477-478), and of §§ 11343-11347 in regard to mergers and other multicarrier transactions (§ 5(2), 41 Stat. 481), and also enacted the predecessor of the RLA (41 Stat. 469-474). In *United States* v. *Lowden*, *supra*, 308 U.S.

[9] Moreover, the Third Circuit cited its *P&LE I* ruling for the proposition that "the ICC has no power to prevent a strike," so that "a bargaining order under the RLA" is more consonant with the policy of both acts "to keep the rails running" by "ensur[ing] that labor will not engage in a work stoppage." Pet. at 51a-52a; 845 F.2d at 443-444. But if *P&LE I* was wrongly decided, any strike over a line sale authorized by the ICC may be enjoined, while an RLA "bargaining order" only prevents a strike until the major-dispute procedures of the RLA have been exhausted in regard to proposed labor protections. Hence, accommodation of both the NLGA and the RLA to § 10901 of the ICA would go further than the RLA itself in carrying out its major purpose of preventing strikes.

at 235, this Court described all those aspects of the 1920 Act as part of the "now extensive history of legislation regulating the relations of railroad employees and employers."

Lowden affirmed the ICC's discretionary authority to condition approval of a railroad merger upon protection for employees when in the public interest. That authority may "promote the public interest in its statutory meaning" by, among other things, "prevent[ing] interruption of interstate commerce through labor disputes growing out of labor grievances . . . ." 308 U.S. at 238. In *ICC* v. *Railway Labor Assn.*, 315 U.S. 373 (1942), the Court similarly held that the ICC had discretionary authority to condition its approval of abandonments, under the predecessor of § 10901 as well as of § 10903, upon protection for employees. That authority also served the public interest as the "possible unstabilizing effects on the national railroad system" of labor disputes "are no smaller in the case of an abandonment like the one before us than in a consolidation like that involved in the *Lowden* case." 315 U.S. at 377.[10]

[10] *Lowden* was decided just before and *Railway Labor Assn.* was decided after the Transportation Act of 1940 (54 Stat. 898) amended former § 5(2) of the ICA to mandate the imposition of employee protections as a condition upon the ICC's approval of mergers and other covered transactions. Since that provision merely gave "legislative emphasis to a policy and a practice already recognized . . . by making the practice mandatory instead of discretionary," it neither implied that the ICC did not have such discretionary authority as to approved mergers, etc., prior to the 1940 amendment, *Lowden*, 308 U.S. at 239, or in regard to its approval of abandonments, etc., under the predecessor to § 10901 which had not been similarly amended by the 1940 Act, *Railway Labor Assn.*, 315 U.S. at 379. Those decisions point up the error below in *P&LE I* when the court distinguished the holding in *Missouri Pacific R. Co.* v. *United Transp. Union*, *supra*, that the NLGA must be accommodated to the ICC's jurisdiction under §§ 11343-11347, because § 11347 requires "the ICC to impose employee protective conditions" while "there is no such requirement"

As does § 11347, its predecessor authorized the railroads involved in a covered transaction and unions representing their employees to agree upon the protections to be imposed by the ICC as a condition of its approval. *Norfolk & Western R. Co.* v. *Nemitz*, 404 U.S. 37 (1971), held that such a "pre-consolidation agreement" constituted a "protective order of the Commission" (*id.* at 45) so that rights thereunder could not be "substantially abrogate[d]" by a subsequent agreement between the consolidated railroad and a union (*id.* at 44). Although the Court did not explicitly discuss the applicability of the RLA, it affirmed a decision by the Sixth Circuit which concluded, among other things, that the RLA "should not be applied" as its "application would threaten to prevent many consolidations" approved by the ICC. 436 F.2d 841, 845. That is equally true of approved line sales.

Those cases illustrate that the ICC's § 10901 jurisdiction over labor protection is not an unimportant aberration, but rather is an aspect of a jurisdiction that extends over a variety of railroad transactions for which ICC approval is required. Since 1920, that jurisdiction has been extended or modified not only in the Transportation Act of 1940, but also in the Railroad Revitalization and Regulatory Reform Act of 1976 (90 Stat. 31) and the Staggers Act of 1980 (94 Stat. 1985). We have summarized that course of statutory development in the NRLC's *amicus* brief in support of the petition in

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in regard to § 10901 line sales. Pet. at A-12 and 13 n.8; 831 F.2d at 1237 n.8. To hold that unions may strike because the ICC has been given discretion is in effect to negate the decision of Congress to give the ICC such discretion rather than to require protections. It should be noted, moreover, that where Congress mandated employee protections, it established a minimum, so that the ICC retains discretion to require more. *E.g., Railway Labor Assn.* v. *United States*, 339 U.S. 142 (1950).

P&LE I, at 13-15.[11] After covering much the same ground, the ICC noted that:

> "Congress has routinely affirmed and expanded the importance of the [ICA] as a part of the complex of laws governing labor relations in the rail industry. . . . For more than fifty years the Commission has exercised its authority in this field, frequently at the request and with the support of labor, and our decisions have had enormous impact on the shape of rail labor relations throughout this period."

FRVR Corporation, Etc., App. B *supra* at 14a-15a.

The fact that the national rail transportation policy lists fifteen policies to guide the ICC in exercising its manifold functions does not mean that each such policy is relevant to every ICC decision. *Illinois Commerce Commission* v. *I.C.C.*, 787 F.2d 616, 627 (D.C. Cir. 1986). But in exercising its jurisdiction over line sales, the ICC certainly is entitled to give weight to the policy "to reduce regulatory barriers to entry into and exit from the industry" (§ 10101a(7)), for example, as well

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[11] As also noted in that brief, at 16 n.9, the Congress has dealt with the issue of protection for labor employees in a number of statutes relating to the creation of Amtrak or to certain railroad bankruptcies, in addition to the ICA. None of those statutes and none of the other relevant provisions of the ICA contain an express equivalent of the "exempt[ion]," in 11341a, "from the antitrust laws, and from all other law, including State and municipal law, as necessary" to the carrying out of a merger or other transaction approved under §§ 11343-11347. The court below in *P&LE I* also distinguished the *Missouri Pacific* case (see n.10, p. 15, *supra*), because the ICA does not include a similar express exemption in regard to approved line sales under § 10901. However, none of the statutory provisions to which the NLGA has been accommodated by this Court contained an express exemption from the application of the NLGA. And, the express exemption in the predecessor of § 11341a from "State and municipal law" did not prevent the Court, in *Chicago & N.W. Tr. Co.* v. *Kalo Brick & Tile Co.*, *supra*, from holding that the ICC's jurisdiction under the predecessor to § 10901 supersedes inconsistent State laws.

as to the policy "to encourage fair wages and safe and suitable working conditions in the railroad industry" (§ 10101a(12)). However, this is the most important reason in our opinion why the RLA and the NLGA should be accommodated to the ICC's jurisdiction under § 10901. As the ICC stated in *FRVR Corporation, Etc.*, App. B *supra* at 17a:

> "That the concern for labor equity is only one of many conflicting aspects of National Transportation Policy should not be seen as a derogation of the agency's authority—rather it is precisely the reason why the [ICA] must be recognized to have pre-eminence. . . ." In the discharge of our responsibilities, we are charged with the expert resolution of many-sided confiicts between disputants, public and private. The recitation above of the factors leading to our [*Ex Parte 392*] policy illustrates the complexity of the process and information that led to our present policy."

A principal reason why "Congress has vested expert administrative bodies such as the Interstate Commerce Commission with broad discretion and has charged them with the duty to execute stated and specific statutory policies" is that resolving the various revelant "considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission . . . ." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79, 87 (1944).[12]

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[12] See, generally, 321 U.S. at 79-88, and with specific reference to the national transportation policy as it then read, at 80-83. Among other things, the ICC does not have "the duty or authority to execute . . . other laws," as such, but "in executing those policies [of the ICA] the Commission may be faced with overlapping and at times inconsistent policies embodied in other legislation enacted at different times and with different problems in view. When this is true, it cannot, without more, ignore" them. 321 U.S. at 79-80. "The precise adjustments which [the ICC] must make," by reason of such other laws, "will vary from instance to instance," but consideration of such other laws "is significant chiefly as it aids in the attainment of the objectives of the national transportation policy" and the ICC "is not bound . . . to accede to the policies [in that case] of the antitrust laws" as "their dictates" can "be overborne by 'the public interest'" expressed in the national transportation policy. 321 U.S. at 80, 85-86. The fact that the RLEA and its member unions thus could urge upon the ICC the policies of the RLA for consideration in determining the extent to which authorized line sales should be conditioned upon employee protections is all the more reason for concluding, among other things, that the injunction in *P&LE II* constitutes an impermissible collateral attack upon the ICC's authorization of the sale of P&LE's lines. See n.6, p. 10 *supra*.

The belief below that "the interests of labor are, at best, only a relatively small concern of the ICC," has no support other than the fact that the interests of labor are not the ICC's only concern; and, as shown above, that fact makes it likely, rather than "highly unlikely that Congress intended that rail labor look to the ICC as its sole source of protection." Certainly, the fact that the ICC ultimately concluded in *Ex Parte 392* that its authorization of line sales should not be conditioned upon employee protections, except in extraordinary circumstances, does not mean that the ICC's concern for the interests of labor was small, but only that those interests to the extent adverse to ICC's decision were overridden by other considerations relevant to the ICC's determination of the public interest.[13]

Moreover, the interests of labor are not necessarily congruent with the views of the RLEA, and the ICC has found that its *Ex Parte 392* policy of encouraging the formation of new short line and regional railroads has

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[13] For many years continuing to date, the ICC almost invariably conditioned its approvals of railroad transactions upon employee protections, regardless of whether mandatory or discretionary. The ICC's *Ex Parte 392* policy is by far the most important exception. At least from the railroads' point of view, therefore, the belief that the ICC has "only a relatively small concern" for "the interests of labor" not only is wrong, it is ludicrous.

preserved railroad jobs as well as railroad service that otherwise would be lost. See n.2, p. 2, and pp. 5-6 *supra*. The ICC fully considered the arguments of the RLEA in *Ex Parte 392* and was upheld upon appeals by the RLEA and others. Hence, it must be accepted for purposes of this case that the ICC gave the interests of labor all the concern that Congress intended.

We submit, therefore, that both the RLA and the NLGA should be accommodated to the administrative procedures provided in § 10901 of the ICA for resolving disputes over employee protections in regard to authorized line sales. The Court thereby can reconcile those statutory provisions and policies in a way that makes sense both as a matter of fact and as a matter of controlling judicial doctrines.

II. Neither the Decision to Sell Nor the Effects of A Line Sale Upon Employees Is A Mandatorily Bargainable Issue Under the Railway Labor Act.

The argument above seems the simplest and most clearcut basis for reversing both decisions below. There is much to be said, however, for an alternative approach reconciling the RLA and the ICA by holding that the duty to bargain under the RLA does not include line sales authorized by the ICC. In that event, the NLGA should be accommodated to the administrative jurisdiction of the ICC to resolve disputes over employee protections, essentially for the reasons stated above; and in addition should be accommodated to the restriction thus placed upon mandatorily bargainable issues by the RLA.[14]

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[14] Sections 8(a)(5) and (d) of the NLRA, 29 U.S.C. §§ 158(a)(5) and (d), in imposing a duty to bargain in good faith with respect to "wages, hours, and other terms and conditions of employment," thereby also limits that duty to those subjects. *Labor Board* v. *Borg-Warner Corp.*, 356 U.S. 342, 348-349 (1958). Thus, it "is unlawful to insist upon" agreement respecting other matters even though it is permissible to bargain and agree about them voluntarily. *Id.* at 349. The same distinction between mandatory and permissible subjects of bargaining is made by § 2 First of the RLA which imposes a duty to exert every reasonable effort to make and maintain agreements concerning "rates of pay, rules, and working conditions." 45 U.S.C. § 152 First. *E.g., Japan Air Lines Co.* v. *Intern. Ass'n of Machinists*, 538 F.2d 46, 51-52 (2d Cir. 1976). Hence, a strike over an issue that is not mandatorily bargainable "is illegal as in violation of the [RLA] and subject to injunction" despite § 4 of the NLGA. *Bangor & Aroostook R. Co.* v. *Brotherhood of Locomotive F. & E.*, 253 F. Supp. 682, 688 (D.D.C. 1966), *aff'd* in relevant part, 385 F.2d 581, 603-604, 613-614 (D.C. Cir. 1967), *cert. denied*, 390 U.S. 923 (1968). See, also, *Illinois Central R. Co.* v. *Locomotive Engineers*, 443 F.2d 136, 144 (7th Cir. 1971); *Seaboard World Airlines, Inc.* v. *Transport Workers Union*, 425 F.2d 1086, 1091-1092 (2d Cir. 1970), and 443 F.2d 437 (2d Cir. 1971); *Chicago & North Western Ry.* v. *Order of Rail. Tel.*, 264 F.2d 254, 259-260 (7th Cir. 1959), *rev'd* on other grounds, 362 U.S. 330 (1960); *Brotherhood of Rail. Train.* v. *New York Central R. Co.*, 246 F.2d 114, 118 (6th Cir. 1957), *cert. denied*, 355 U.S. 877 (1957); *Pullman Co.* v. *Railway Conductors*, 49 L.R.R.M. 3162, 3165 (N.D. Ill. 1962), *rev'd* on other grounds, 316 F.2d 556 (7th Cir. 1963), *cert. denied*, 375 U.S. 820 (1963).

As the Court observed in regard to the duty to bargain under the NLRA, "in establishing what issues must be submitted to the process of bargaining, Congress had no expectation that the elected union representative would become an equal partner in the running of the business . . . ." *First National Maintenance Corp.* v. *NLRB*, 452 U.S. 666, 676 (1981). "Management must be free from the constraints of the bargaining process to the extent essential for the running of a profitable business," and "also must have some degree of certainty beforehand as to when it may proceed to reach decisions without fear of later evaluations . . . ." *Id.* at 678-679. Hence, "in view of an employer's need for unencumbered decision-making, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." *Id.* at 679.

That surely is even more the case under the RLA, particularly in the context of railroad transactions invoking the jurisdiction of the ICC to condition its approval upon protection for employees when in the public interest. By so providing, Congress must have concluded that those situations are not amenable to "the belief that collective discussions backed by the parties' economic weapons will result in decisions that are better for both management and labor and for society as a whole," upon which the "concept of mandatory bargaining is premised . . . ." *Id.* at 678. Perhaps the most fundamental defect in the discussion below of the bargainability issue is that the Third Circuit gave no apparent weight to the jurisdiction and authority of the ICC in those regards.[15] They did not disappear even if they did not supersede any duty to bargain imposed by the RLA.

[15] That court did not decide "whether *First National Maintenance* actually applies to railway employees" as it concluded that in any event "the railroad has a duty to bargain over the effects of the transaction prior to implementing its unilateral decision to sell its rail assets," under the RLA as construed in *Telegraphers* v. *Chicago & N.W. R. Co., supra,* without so much as noting that *Telegraphers* did not involve a transaction over which the ICC had jurisdiction and thus could be distinguished on that ground. See Pet. in *P&LE II* at 21a-24a; 845 F.2d at 430-431. Moreover, contrary to the views below (*ibid.*), *Telegraphers* did not hold that "when a decision affects the very existence of the workers' jobs, the RLA mandates bargaining," and did not involve "in effect a [management] decision to close down certain parts of its business." The railroad did not propose to dispose of any part of its business, but only to abolish some of the many local stations at which it did business while continuing to provide the same railroad service through more centrally located stations. See 362 U.S. at 332. In holding that the union's proposal in that case "to negotiate about the job security of its members" did not "represent[] an attempt to usurp legitimate managerial prerogative in the exercise of business judgment," 362 U.S. at 336, the Court did not hold that any and all job security proposals are mandatorily bargainable under the RLA. Cf. *Fibreboard Corp.* v. *Labor Board,* 379 U.S. 203, 223 (1964) (Stewart, J.).

It is not accidental that the most pertinent language in the RLA describing the mandatory subjects of bargaining—"working conditions"—is narrower on its face than its counterpart in the NLRA—"terms and conditions of employment." Justice Stewart, concurring in *Fibreboard Corp.* v. *Labor Board, supra* at 221-222, observed that in "common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment," but that term is "susceptible of diverse interpretations" and had been more broadly construed by the NLRB and the courts in reviewing its decisions.[16] In rejecting a contention that "the term 'conditions of employment' has no broader meaning than . . . the term 'working conditions,' and that it therefore refers to the physical conditions under which employees are compelled to work rather than to the terms or conditions under which employment status is afforded or withdrawn," the NLRB noted that Senator Wagner (sponsor of the NLRA) had stated in debates on amendments thereto "that the term 'condition of employment' as used in the original Act was intended to have a broader meaning than 'working conditions' . . . ' (93 Congressional Record 3427)." *Inland Steel Company,* 77 N.L.R.B. 1, 7 (1948), *enforced,* 170 F.2d 247 (7th Cir. 1948), *aff'd,* 339 U.S. 382 (1950).[17]

[16] The NLRA "assigned to the Board the primary task of construing" the provisions regarding mandatory subjects of bargaining; thus, "if its construction of the statute is reasonably defensible, it should not be rejected merely because the courts might prefer another view of the statute." *Ford Motor Co.* v. *NLRB,* 441 U.S. 488, 495, 497 (1979). The primary task of construing the pertinent provisions of the RLA is for the courts, so they can adopt the interpretation they believe to be most justifiable even if some other interpretation is reasonably defensible.

[17] In enforcing that decision, the Seventh Circuit similarly noted that: "A comparison of the language of the two Acts shows that Congress in the instant legislation must have intended a bargaining

Textile Workers v. *Darlington Co.*, 380 U.S. 263, 273-274 (1965), held "that when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward the union, such action is not an unfair labor practice" under the NLRA. That decision was premised upon the view that the "proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act." *Id.* at 270. Nonetheless, the NLRB has held that an employer has a duty to bargain in regard to the effects of a total closure upon employees.[18] *First National Maintenance, supra*, held (reversing the NLRB) that an employer's decision partially to close its business is not mandatorily bargainable under the NLRA. 452 U.S. at 680-686. The employer had "consented to enforcement of the Board's order concerning bargaining over the effects of the closing and ha[d] reached agreement with the union on severance pay," 452 U.S. at 677-678 n.15, and the Court thus assumed that the Board correctly held that the em-

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provision of broader scope than that contemplated in the [RLA] . . . . Congress in the instant legislation used the phrase, 'other conditions of employment,' instead of the phrase 'working conditions,' which it had previously used in the [RLA]. We think it is obvious that the phrase which it later used is more inclusive than that which it had formerly used." 170 F.2d at 254-255.

[18] In *Triplex Oil Refining Division*, 194 N.L.R.B. 500, 504 (1971), an Administrative Law Judge noted that a prior NLRB decision had held that effects bargaining is mandatory, and concluded that "the Board's determination that the exclusionary language of *Darlington* . . . does not apply" was "[i]mplicit in" that prior decision. The NLRB in subsequent cases has mandated effects bargaining in a complete closure situation, all without explaining how the "exclusionary language" in *Darlington* can be distinguished (insofar as we have discovered). *E.g.*, *P.J. Hammil Transfer Co.*, 277 N.L.R.B. 462, 463 (1985); *Eagle Express Co.*, 273 N.L.R.B. 501, 503 (1984). See *Kirkwood Fabricators* v. *N.L.R.B.*, —— F.2d ——, WestLaw slip op. at 3-5 (8th Cir., Dec. 5, 1988).

ployer had a mandatory duty to engage in such effects bargaining.

A sale of part or all of a business, as well as a closure, plainly involves "a change in the scope and direction of the enterprise," and thus "is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'" *Id.* at 677, quoting the concurrence in *Fibreboard* which further described such decisions as being "at the core of entrepreneurial control." 379 U.S. at 223. Indeed, a sale of an ongoing business is a closure from the point of view of management, and from labor's point of view may provide an opportunity for employment by the purchaser that would not exist in the event of a closure. Hence, this difference provides an additional reason for holding that a line sale does not give rise to bargainable issues.[19] But in assessing the applicability of those cases in an RLA context, it also is necessary to heed the admonition that the NLRA "cannot be imported wholesale into the railway labor arena," so that "analogies must be drawn circumspectly with due regard to the many differences beween the statutory schemes." *Railroad Trainmen* v. *Terminal Co.*, *supra*, 394 U.S. at 383.

The ICC's jurisdiction and the more restrictive language of the RLA in regard to mandatory subjects of bargaining, discussed above, provide strong reasons not available under the NLRA for holding that a decision to close or sell all or part of a railroad is not mandatorily

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[19] A closure in the railroad context involves an abandonment of railroad lines. The fact that a line sale offers a better prospect of continued railroad employment (as well as providing continued railroad service) was one of the factors that persuaded the ICC to encourage line sales as an alternative to abandonments. See pp. 2, 5-6 *supra*. In *FRVR Corporation, Etc.*, *supra*, App. B at 6a n.11, a staff analysis had demonstrated "that employment on the new lines, particularly the larger regional carriers, is typically drawn from the work force of the selling carrier."

bargainable, and for refusing to import into the RLA the view of the NLRB that the effects on employees nonetheless are bargainable under the NLRA. Another important difference between the statutory schemes, which also strongly supports those conclusions, is the vastly greater delay before the transaction can be implemented (and the consequences of that delay) that normally will result under the RLA if either the decision or its effects is mandatorily bargainable.

An "important difference . . . between permitted bargaining and mandated bargaining" is that mandatory bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose." *First National Maintenance, supra*, 452 U.S. at 683.[20] That important difference was an important factor supporting the Court's conclusion that a decision to close part of a business is not mandatorily bargainable under the NLRA. The weight given to that factor surely must be much greater under the RLA, in view of its provisions requiring maintenance of the *status quo* in regard to mandatory subjects of bargaining until the exhaustion of procedures described by this Court as "long and drawn out," as "almost interminable," and as "'virtually endless." See pp. 5-6, *supra*.[21]

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[20] The RLEA apparently utilized the delay caused by the *P&LE II* injunction to attempt to negotiate a purchase of the P&LE lines by the unions, either alone or in conjunction with another carrier, rather than to bargain about employee protections. See Petitioner's Supplemental Brief (Nov. 22, 1988).

[21] Under the NLRA, an employer need only await an impasse in the bargaining before taking unilateral action in regard to a mandatory subject of bargaining. *Labor Board* v. *Katz*, 369 U.S. 736 (1962). In general, an impasse exists when "good faith negotiations have exhausted the prospects of concluding an agreement," which is a "matter of judgment" and depends upon the facts and circumstances of the particular case. *Taft Broadcasting Co.*, 163

Moreover, a violation of those *status quo* provisions may be enjoined at the behest of the injured party, while only the NLRB is authorized by the NLRA to seek injunctive relief against an unlawful refusal to bargain (29 U.S.C. § 160(j)) and the parties to the dispute may not do so. See *Bakery Drivers Union* v. *Wagshal*, 333 U.S. 437, 442 (1948). In the usual case, therefore, a contention that an employer violated the Act by refusing to bargain about a mandatory subject of bargaining is not decided by the NLRB until long after the alleged violation occurred. If it finds that an employer unlawfully failed to bargain about the effects of a transaction, the NLRB's standard remedy neither requires the transaction to be undone nor awards back pay to employees deprived of employment by consummation of the transaction during the period prior to the Board's order and for five days thereafter.[22]

N.L.R.B. 475, 478 (1967), *enforced*, 395 F.2d 622 (D.C. Cir. 1968). See Morris, *The Developing Labor Law* (2d ed. 1983), at 634-636, and the Third Supplement thereto (1988) at 279-280. Although that period thus may vary, neither "cases nor commonsense teach that an impasse may not be reached at even a single session" of bargaining. *Presto Casting Co.*, 262 N.L.R.B. 346, 353 (1982), *enforced* in part, 708 F.2d 495 (9th Cir. 1983). And, if a business emergency necessitates swift action, a sale may be consummated with little or no advance notice and bargaining, although that does not obviate the duty to bargain about the effects of the transaction thereafter. *Yorke* v. *N.L.R.B.*, 709 F.2d 1138, 1144 (7th Cir. 1983), *cert. denied*, 465 U.S. 1023 (1984).

[22] *Transmarine Navigation Corporation*, 170 N.L.R.B. 389, 390 (1968). Such employees are awarded an amount equivalent to two-weeks pay, and (if greater) the amount they would have earned during the period from five days after the date of the order until an agreement is made or an impasse reached in the effects bargaining ordered by the Board if requested by the union within five days after the date of the Board's order. *See Yorke* v. *N.L.R.B.*, *supra*, which held that the back-pay period should not commence until five days after the NLRB's order is enforced on appeal if the employer had a "debateable" basis for its appeal. 709 F.2d at 1144-1146. If an employer is held to have violated a duty to engage in decision

The extraordinarily powerful tool for delay created by the decision below that effects bargaining is mandatory under the RLA has torpedoed the sale which the ICC authorized, as the Third Circuit conceded might well occur. It seems to us self evident that to "allow the Union to force a company to bargain about the effects of its management decisions to the extent of forcing it to forego the proposed change in operations would be in effect to take away from it the freedom to make the decision in the first place." *International Ass'n of M. & A. W.* v. *Northeast Airlines, Inc.*, 473 F.2d 549, 558 (1st Cir. 1972), *cert. denied*, 409 U.S. 845 (1972).[23]

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bargaining, back pay is awarded from the date that the employer consummated the transaction. If the employer also is found to have been "discriminatorily motivated," the employer is ordered "to restore the *status quo ante* by reestablishing the closed operation, unless [it] can show that such a remedy would be unduly burdensome." *National Family Opinion, Inc.*, 246 N.L.R.B. 521 (1979). "The assumption underlying the more-limited remedy [for an effects-bargaining violation] is that, inasmuch as the employer's operation would have closed regardless of good-faith bargaining . . . , ordering a make-whole remedy would be punitive, rather than compensatory." *Id.* at 522 n.5. This difference in remedies, and the minimal nature of the remedy for violation of a duty to engage in effects bargaining, goes far towards explaining the willingness of the NLRB and the lower courts to conclude that effects bargaining is mandated by the NLRB even if decision bargaining is not. Under the RLA, on the other hand, a determination that either is mandated may result in a *status quo* injunction preventing consummation of the transaction, such as was entered in *P&LE II*.

[23] The First Circuit essentially applied, as to both decision and effects bargaining under the RLA, the balancing analysis subsequently adopted by this Court in *First National Maintenance Corp.*, see 473 F.2d 556-559, which cited the First Circuit with approval, 452 U.S. at 683 n.20. The First Circuit emphasized that some of the union's demands in that case could not be effectuated without a renegotiation of the merger agreement. "Where it is clear . . . that bargaining about some effects of the decision [to merge] would be ineffectual unless the company could be required to renegotiate the merger, we believe that the duty to bargain about those effects does not arise at all." 473 F.2d at 558-559. The unions in this case

That essentially would occur in regard to railroad line sales (particularly if, as is usual, only a partial sale is involved), even if the effects bargaining could take place after the sale is consummated. The protections commonly demanded by the unions would make a sale economically infeasible. If the seller refused to agree to the unions' proposals, its remaining lines could be struck and other railroads secondarily picketed once the RLA's major-dispute procedures are exhausted. And, at best, uncertainty about an important future cost factor would make the desirability of consummating a line sale very questionable. The chilling effect of such factors upon line sales is easy to foresee.

Thus, if the Court reaches the issue, it should hold that there is no duty under the RLA to bargain about either the decision to sell or its effects upon employees.

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demanded that P&LE require a purchaser to assume its employees and collective agreements, which could not be done without renegotiating the sale. And, the First Circuit had "no doubt but that an employer . . . could refuse to discuss as unreasonable any labor protective terms" proposed by a union that would make effectuation of the employer's nonbargainable decision "prohibitively expensive . . . ." *Id.* at 558. That is true of the unions' other demands for job and compensation guarantees by P&LE plus treble damages for any losses incurred by the employees as a result of the sale.

CONCLUSION

For the reasons stated above and in the Brief for Petitioner, both decisions below should be reversed.

Respectfully submitted,

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January 18, 1989